

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:
Ethan VICKERY

Serial No.: 10/550,378

Filed: 09/21/2005

For: TAMPER RESISTANT WEIGHTED
RODENT AND INSECT BAIT STATION

Confirmation No.: 3385

Examiner: Ark, Darren W.

Group Art Unit: 3643

Atty. Dkt. No.: VICE:005US

**CERTIFICATE OF ELECTRONIC SUBMISSION
37 C.F.R. § 1.8**

I certify that this correspondence is being electronically filed with the United States Patent and Trademark Office via EFS-Web on the date below from Austin, Texas prior to 11:59 p.m. Central Time:

May 13, 2009
Date

/Mark T. Garrett/
Mark T. Garrett

SUPPLEMENTAL RESPONSE TO FEBRUARY 18, 2009 OFFICE ACTION

Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

Commissioner:

Applicant submits this paper as a supplement to its May 13, 2009 response to the February 18, 2009 Office Action. Attached are the March, 2009 email exchanges between Applicant's representative, Mark Garrett, and Examiner Ark referenced in the Examiner Interview Summary but inadvertently not attached to the response.

The Examiner is invited to contact Applicant's attorney with any questions or comments relating to this application.

FULBRIGHT & JAWORSKI L.L.P.
600 Congress Avenue, Suite 2400
Austin, Texas 78701
Telephone: (512)536-3018
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Date: May 13, 2009

Respectfully submitted,

/Mark T. Garrett/

Mark T. Garrett
Reg. No. 44,699

Garrett, Mark

From: Ark, Darren [Darren.Ark@USPTO.GOV]
Sent: Monday, March 30, 2009 2:47 PM
To: Garrett, Mark
Subject: RE: S/N: 10/550,378

It makes sense, but I am not persuaded to allow the case based on the arguments you have presented and by amending the claims only to have items 1 and 2 added.

From: Garrett, Mark [mailto:mgarrett@fulbright.com]
Sent: Monday, March 30, 2009 1:52 PM
To: Ark, Darren
Subject: RE: S/N: 10/550,378

You can frame the issue as you have, but the question then becomes: is it obvious to modify Crossen in that manner. It is not because of what Crossen teaches (explained below). The law does not permit the Office to ignore the teachings of the references it proposes to modify; otherwise, virtually no modification would ever be improper and virtually everything would be obvious. Thus, these are not different issues, as it seems you consider them; rather, these are different aspects of the same issue. Crossen is simply not a suitable reference to modify as proposed.

Does that make sense?

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From: Ark, Darren [mailto:Darren.Ark@USPTO.GOV]
Sent: Monday, March 30, 2009 12:40 PM
To: Garrett, Mark
Subject: RE: S/N: 10/550,378

It makes sense but, the issue at hand is not the particular distribution of ballast material, rather would it have been obvious to substitute and non-alterable weight system for a weight system with a receptacle having an open volume for receiving a variable amount and kind of ballast. In my opinion, I think it is obvious to do so. The reason I feel strongly about this is also reinforced by the fact that the Patent Classification has a class 248 subclass 910 titled "Weighted Base" defined as "...structure which comprises a base having means for increasing the weight thereof, the means being either an additional means associated with the base or a particular material from which the base is made. This in connection with the other patents related to traps and bait stations which can receive differing amounts and types of ballasts reinforces my thinking with respect to limitation in the claims that is in question.

From: Garrett, Mark [mailto:mgarrett@fulbright.com]
Sent: Monday, March 30, 2009 1:32 PM
To: Ark, Darren
Subject: RE: S/N: 10/550,378

But the law does not consider obvious that which would render a device unsuitable for its intended purpose, and the law requires consideration of the purpose/function of the prior art structure being modified. For example, in *Ex parte Fabrot*, Appeal No. 2008-4799 (BPAI Feb. 24, 2009), a recent Board decision to address this type of issue, the Board reversed an obviousness rejection because replacing the primary reference's lotion with a secondary reference's gel "would eliminate a critical function" of the primary reference's product. In other words, the Board scrutinized the function of the element of the primary reference the Examiner sought to replace, just as the

05/13/2009

function of Crossen's weight must be scrutinized. Here, again, it would not be obvious to replace Crossen's weight -- the actual invention, as Crossen saw it -- with something that could not perform the same function Crossen set forth (attachment to the heavier part of the weight itself).

Does that make sense?

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From: Ark, Darren [<mailto:Darren.Ark@USPTO.GOV>]

Sent: Monday, March 30, 2009 12:22 PM

To: Garrett, Mark

Subject: RE: S/N: 10/550,378

No, it does not concern me since we are not attempting to interpret Crossen with respect to a limitation in the applicant's claims that works against such teaching nor is such a teaching counter to this feature present in the application.

From: Garrett, Mark [<mailto:mgarrett@fulbright.com>]

Sent: Monday, March 30, 2009 1:16 PM

To: Ark, Darren

Subject: RE: S/N: 10/550,378

Thank you.

And just so you did not miss this point among those made below: Crossen stresses attaching his weight to the bait station at the denser/heavier part of his weight. That would no longer be possible if the modification you proposed were made. But that does not concern you - correct?

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From: Ark, Darren [<mailto:Darren.Ark@USPTO.GOV>]

Sent: Monday, March 30, 2009 12:11 PM

To: Garrett, Mark

Subject: RE: S/N: 10/550,378

Although Crossen's device is sort of like an integral structure, my view is that it would have been obvious to take that integral and non-adjustable weight structure and replace it with a base whose volume may be adjusted according to ballast composition and ballast amount. In my opinion, that is not an unreasonable combination with another reference having a compartment (which may or may not be removable from the bait station, since Crossen already discloses the aspect of the bait station removably mounted to the weight below it) whose contents can be varied by the user.

From: Garrett, Mark [<mailto:mgarrett@fulbright.com>]

Sent: Monday, March 30, 2009 1:04 PM

To: Ark, Darren

Subject: RE: S/N: 10/550,378

Thank you.

05/13/2009

I want to make sure we are on the same page about one issue. Crossen does not disclose a receptacle. Moreover, Crossen's weight is important to his invention -- in fact, he describes the weight itself as his invention -- for all the reasons identified below. So, I am still not certain why you believe it would make sense to discard that weight in favor of an unrelated approach to weighing down Crossen's bait station (which he describes as old). This would completely change the structure and function of Crossen's device.

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From: Ark, Darren [<mailto:Darren.Ark@USPTO.GOV>]
Sent: Monday, March 30, 2009 11:59 AM
To: Garrett, Mark
Subject: RE: S/N: 10/550,378

Although it is not a 102(b) reference, I am trying to show that it would have been obvious to modify Crossen with Morell or any of the other devices which show the addition of weights to a portion below the receptacle to provide a user adjusted ballast. The proposal to add items 1 and 2 from your last email are insufficient in my opinion to overcome the prior art. It may be best to either file a response to the Non-Final Action mailed on 2/18/2009 or file a Notice of Appeal at this time since both sides feel strongly about their positions.

From: Garrett, Mark [<mailto:mgarrett@fulbright.com>]
Sent: Monday, March 30, 2009 12:53 PM
To: Ark, Darren
Subject: RE: S/N: 10/550,378

Morell's compartments are inside the bait station, not secured to them with protrusions that extend up through the bottom of the bait station. In fact, the claimed configuration is the antithesis of Morell's foldable construction. This is clear from reviewing the first column of Morell's patent. In short, Morell does not anticipate or render the claims obvious, nor would there be any logical reason to combine it with Crossen.

If you would like to me to re-cap in a separate email the shortcomings of the references you have identified, I would be happy to do so. To summarize the claim amendments we would be willing to make, we are willing to: 1) amend the independent claim to recite that the bait station comprises both a base and a lid, and 2) amend the independent claim to recite placing bait in the bait station.

I look forward to hearing from you.

Mark Garrett, Partner

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From: Ark, Darren [<mailto:Darren.Ark@USPTO.GOV>]
Sent: Monday, March 30, 2009 8:41 AM
To: Garrett, Mark
Subject: RE: S/N: 10/550,378

Also see Morell et al. 3,343,744 which is a bait box for holding poisoning rodents comprising a box with triangular compartments A which are adapted to be filled with sand, gravel or the like so as to provide the necessary weight to prevent the set-up box from being moved either by wind or by an animal seeking the bait which is placed within compartment B, wherein it can be interpreted that sand and gravel are pre-formed by mother nature.

From: Garrett, Mark [<mailto:mgarrett@fulbright.com>]
Sent: Thursday, March 26, 2009 1:16 PM

05/13/2009

To: Ark, Darren
Subject: RE: S/N: 10/550,378

Thank you again for taking the time to consider this case so thoroughly.

The motivations suggested -- varying factors such as wind and inclination of terrain -- have shortcomings. First, Crossen specifically addresses wind, and notes that his weight is sufficient: "The rodent bait station weight of the present invention prevents the accidental tipping over a bait station, for example, ****by the wind**** and the rodent bait station is economical to manufacture." Col. 4, lines 1-4 (emphasis added). As the Board has held, a problem that a primary reference has ***already*** solved is ***not*** one that can support a finding of obviousness. See *Ex parte Rinkevich*, Appeal No. 2007-1317, slip op. at 8-9 (BPAI May 29, 2007) (noting that "the problem proffered by the Examiner is already solved" by the primary reference, and explaining that "a person of ordinary skill in the art having common sense at the time of the invention would not have reasonably looked at [a secondary reference] to solve a problem already solved by [the primary reference]").

Second, terrain inclination is not an actual issue in the art of weighted bait stations. Weighted bait stations are placed on surfaces that are either flat or nearly flat, so there is no concern of whether the weighted bait station will slide on its own. If you have evidence of terrain being an issue, we will be glad to address it and provide rebuttal declaratory evidence. A specification search of US patents and published applications for ("bait station" and inclin\$ and terrain\$) yielded only one irrelevant published application.

Therefore, neither purported motivation can serve as a rational basis for redesigning Crossen's device. Moreover, Crossen stresses that the his weights are connected at their denser, heavier portion (101 or 123) to the bait station. He explains that doing this "ensures a strong and sturdy mechanical bond with the bait station" (col. 3, lines 6-8) and "vastly improves the anchoring characteristics of the weight 120." (Col. 3, lines 53-55). Changing Crossen so that the bait station is connected to a ***receptacle*** in which a weight resides -- and eliminating the important connection between the dense/heavy part of his specialized weight and the bait station -- would contravene Crossen's intended purpose.

Jalbert I (3,708,905) is not properly combinable with Crossen for the reasons above. In addition, the ballast boxes 100 in Jalbert I do not have protrusions that extend up through holes in the bottom of Jalbert 1's trap. Rather, they are attached with angle members 116 to plastic strips 36 secured to the lower side of the bottom frame of the trap. The bolts connecting the angled pieces to the plastic strips terminate in the plastic strips, as shown in FIG. 7. Moreover, Crossen emphasized a weight that is "easy to attach and remove" (col. 2, lines 16-17) and "economical to manufacture" (col. 4, lines 3-4). Jalbert 1's ballast boxes -- with the multiple angled pieces and strips and connectors -- are too complex to comport with either of these objectives.

Ball (3,471,114) is not properly combinable with Crossen for the reasons above. Ball has other shortcomings as well. The weights (sand/water) are not pre-formed, and Ball is specifically designed for liquid given the threaded plug 28. Additionally, the ballast base does not have protrusions that extend through holes in the bottom of the garbage can.

The weights in Jalbert II (3,821,861) are placed in the trap itself, not in a separate receptacle that is secured to the trap.

The weight in Harrison (5,131,184) is not in a receptacle either. It is bolted to the trap, much like Crossen's, but in an entirely different setting (minnow trap in water).

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From: Ark, Darren [<mailto:Darren.Ark@USPTO.GOV>]
Sent: Wednesday, March 25, 2009 8:07 PM
To: Garrett, Mark
Subject: RE: S/N: 10/550,378

I still feel strongly that to vary a weight placed within a bait station would have been obvious to one of ordinary skill in the art so as to maintain the bait station in a single location due to varying factors such as wind or

05/13/2009

inclination of terrain (steepness of a hill for instance). Varying the weight could be dependent upon volume of material or density of material. Jalbert 3,708,905 discloses ballast boxes (100) can be fitted with rock or other suitable ballast which infers that whatever weight necessary to weight the trap will be placed therein. Ball 3,471,114 discloses the use of either sand or water as ballast, both of which have different densities and thus would provide different weight amounts. Harrison 5,131,184 discloses a trap with a weight (28) that may vary between 25-35 weight range. Jalbert 3,821,861 discloses slab weights (44) which can be interchanged to provide the correct weight required for the waters being worked (see col. 3, lines 58-60). In some of the I think that the patentable features of the method involve the specific details pertaining to the grooves and protrusions and the manner in which the receptacle and bait station are joined together as stated previously.

From: Garrett, Mark [mailto:mgarrett@fulbright.com]
Sent: Wednesday, March 25, 2009 7:36 PM
To: Ark, Darren
Subject: RE: S/N: 10/550,378

I very much appreciate your consideration.

McClellan (7,213,869 - filed April 8, 2005) is not prior art to our application (our PCT was filed on March 20, 2004).

The problem with combining anything with Crossen is that there is no reason to do so. There is no recognition in Crossen that the weight should be varied to the application, or that there is anything wrong with the weight-to-bait station connection. Moreover, Crossen effectively teaches away from changing his weight because he regards the weight as his invention. For example, in the Field of the Invention, he states that the present invention relates to "specially configured weights for securing rodent bait stations." In the Summary, he states that the invention is the weight: "The invention is a tough, durable rodent bait station weight to anchor a bait station firmly in place" In that same paragraph, he discusses the specifics of the weight itself. Later in the specification, he explains that the weight 120 has a heavier central section 123 that serves as the portion of the weight to which the bait station is anchored. He states, "The solid section 123 centralizes the weight distribution of the weight 120 which vastly improves the anchoring characteristics of the weight 120." Thus, changing the weighting system of Crossen is not like changing something irrelevant.

Li (6,637,717) has a receptacle into which stone could be placed, but it has no protrusions that would extend up through openings in the bottom of anything (such as a bait station). Instead, Li's base housing 20 is designed with a chamber 21 into which lower end portion 111 of shaft 11 is simply placed. The shaft can be picked up just as easily -- there is nothing that hold the two together from a vertical perspective besides gravity. There is a spring-loaded foot lever that biases the teeth of an actuator 40 that is mounted in chamber 21 to the rotor 30 of the lower end portion 111 of the shaft, but that is to keep the shaft from rotating (when you want to rotate the shaft, you push down on the foot lever and the actuator disengages from the rotor). Thus, even if it were proper to combine Li's base housing 20 with Crossen's bait station, it still would not meet "causing the protrusions of the receptacle to extend through the openings in the bottom of the plastic bait station."

Graves (GB 2249249) discloses a bait station that includes a weight inside the station, not in a separate receptacle (see Figure 1, which shows the weight using hidden lines, and Figure 2, which shows that the weight is inside the cutaway version of the station). Such a weight does not cure any of Crossen's problems.

I would be willing to add the step of placing bait in the bait station.

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From: Ark, Darren [mailto:Darren.Ark@USPTO.GOV]
Sent: Wednesday, March 25, 2009 4:44 PM
To: Garrett, Mark
Subject: RE: S/N: 10/550,378

I am looking at the case in more detail to figure out a way to overcome the prior art of record and am considering

05/13/2009

rewriting claim 11 to include the limitation of claim 12 and also "a step of placing bait in the plastic bait station". I also propose further amending claim 11 to more particularly claim the manner in which the weight 2400 has a pair of parallel grooves on opposing sides thereof which receive a pair of parallel protrusions 2300 on opposing sides within the receptacle, and then finally reciting the structure in Fig. 3 of bolt 3010, washers 3020 & 3030, and nut 3040 to secure the receptacle to the bait station. I think it will take this sort of detailed amendment to overcome the prior art of record.

From: Garrett, Mark [mailto:mgarrett@fulbright.com]
Sent: Wednesday, March 25, 2009 4:55 PM
To: Ark, Darren
Subject: RE: S/N: 10/550,378

I understand your concern. However, the issue with Crossen is that he does not necessarily disclose a receptacle into which a pre-formed weighted material is placed for the reasons below. Li does not either. Instead, Li just discloses a cover to which a weight is attached. That cover is open to the ground (see the figures and, for example, claim 1, element (a) "an outer cover having an **open** lower end ..."), and therefore is not a receptacle. Water and sand are not pre-formed weighted materials, and basketball goals require so much weight to hold them down (some are 35 gallons, which translates to about 280 lbs of water or 500 lbs of sand) that one would not contemplate/consider using pre-formed weighted material in place of sand/water; that would simply be too much weight to deal with in solid form.

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From: Ark, Darren [mailto:Darren.Ark@USPTO.GOV]
Sent: Tuesday, March 24, 2009 12:29 PM
To: Garrett, Mark
Subject: RE: S/N: 10/550,378

I am concerned about relying on solely the manner in which the weight is formed as the basis for patentability since I believe it would have been obvious to one of ordinary skill in the art to either choose a pre-made weight configuration or a system wherein a container is filled with ballast material (such as those found in portable basketball goals which can receive water or sand) to achieve the desired level of weighting. See Li 6,446,930 which discloses a base receiving a pre-constructed weight (26).

From: Garrett, Mark [mailto:mgarrett@fulbright.com]
Sent: Monday, March 23, 2009 7:16 PM
To: Ark, Darren
Subject: RE: S/N: 10/550,378

Examiner Ark,

I have new information about the process by which the Crossen weight 120 could have been formed, and want to correct an incorrect statement below. Specifically, weight 120 could have been formed in one step (as stated below), or it could have been formed in two steps (contrary to what is stated below), either by forming the central, heavier section 123 first and then forming the outer ring 120 around it, or by forming the outer ring 120 first and then forming the central section next.

Nevertheless, the fact remains that Crossen is silent on how weight 120 is formed (specifying only that it is made from recycled rubber), and nothing in Crossen establishes that weight 120 would necessarily have been formed outer ring first/central section second, as is required to establish the existence of the claimed "placing a pre-formed weighted material in the receptacle."

I look forward to hearing from you.

05/13/2009

Respectfully,

Mark Garrett
512.536.3031

From: Garrett, Mark
Sent: Friday, March 20, 2009 4:56 PM
To: 'darren.ark@uspto.gov'
Subject: S/N: 10/550,378

Examiner Ark,

These are the basics of the arguments/evidence I could present to move the case toward allowance. Your input would be appreciated:

I. Anticipation rejection of claim 11 based on US 6,807,768 (Johnson)

Proposal: amend claim 11 to specify that the bait station comprises a lid and a base. While Johnson discloses these (22 and 24), it does not also disclose a receptacle.

II. Obviousness rejection of claims 11 and 12 over US 6,513,283 (Crossen)

Proposal: the rejection relies on central section 123 being pre-formed weighted material, and the balance of weight 120 being a receptacle. However, Crossen does not suggest that weight 120 is formed in two stages, such that section 123 might be pre-formed and then placed in a pre-formed outer ring of 120. Rather, as a product molded from recycled rubber, weight 120 would be formed in one step. As a result, we do not believe it is appropriate to construe weight 120 (and its central section 123) as satisfying "placing a pre-formed weighted material in the receptacle." If I am misunderstanding the rejection, or if there is a claim amendment that you believe would make this distinction even more clear, please let me know. I should be able to submit declaratory evidence to this effect if that would help.

III. Obviousness rejection of claims 11 and 12 over Crossen in view of US 6,446,930 (Li)

Proposal: the rejection is premised on the same view of weight 120 above. Thus, the same argument applies.

IV. Obviousness rejection of claims 11 and 12 over Crossen in view of Li and US 5,943,814 (Bartlett) or US 4,486,973 (Faucillon)

Proposal: the rejection uses the receptacle and pre-formed weighted material in Bartlett/Faucillon to cure Crossen's+Li's deficiency. However, the concrete that goes into the receptacles of B and F is poured into them (as explained on page 4 of the last response); thus, the concrete is placed in the receptacle in an unformed state (wet), not a pre-formed state as claimed. If I am misunderstanding the rejection, or if there is a claim amendment that you believe would make this distinction even more clear, please let me know. I should be able to submit declaratory evidence from a concrete specialist who can explain that "pre-formed weighted material"-- as used in the application--does not read on wet concrete (i.e., wet concrete would not be understood by those of ordinary skill in the art to be pre-formed weighted material).

I look forward to hearing from you, and thank you for your time.

Respectfully,

Mark Garrett
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Garrett, Mark

From: Ark, Darren [Darren.Ark@USPTO.GOV]
Sent: Wednesday, March 25, 2009 4:24 PM
To: Garrett, Mark
Subject: RE: S/N: 10/550,378

Li 6,637,717 discloses a base (20) with pre-formed weighting material (23 filled with sand or stone) which is subsequently placed in the base. Also see GB 2249249 to Graves which discloses a weight element (16) rigidly secured or bonded within the base (15), wherein the weight (16) must be formed before it can be bonded or secured to base (15). Also see McClellan 7,213,869 which discloses preformed weights (60, 80, 140, or 186) to be placed within a base (10). I think McClellan clearly illustrates the concept of preformed weights placed in a base.

From: Garrett, Mark [mailto:mgarrett@fulbright.com]
Sent: Wednesday, March 25, 2009 4:55 PM
To: Ark, Darren
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Nevertheless, the fact remains that Crossen is silent on how weight 120 is formed (specifying only that it is made from recycled rubber), and nothing in Crossen establishes that weight 120 would necessarily have been formed outer ring first/central section second, as is required to establish the existence of the claimed "placing a pre-formed weighted material in the receptacle."

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Mark Garrett

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